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**Department of Health Services
Guidance to Staff
Implementation of
MBE/WBE Requirements
for SRF Loans to Public Water Systems**

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Introduction: California's Safe Drinking Water State Revolving Fund (SRF) was established to make low cost financing available to public water systems to enable them to meet drinking water standards for safety and health protection. The Department of Health Services (DHS), with support from the Department of Water Resources (DWR), receives SRF funds from the U.S. Environmental Protection Agency (EPA), adds State matching funds, then provides California water systems low cost financing opportunities, related technical assistance, and funds source water protection activities.

Since the majority of the funds available through the SRF program are federal assistance monies, SRF loan recipients must meet certain federal requirements. Among these is the requirement to provide opportunities to small, disadvantaged, and women owned business enterprises (commonly known as minority and women owned business requirements or MBE/WBE requirements). The objective of the MBE/WBE requirement is to provide meaningful opportunities for these businesses to participate in bidding on contracts and subcontracts for SRF funded projects.

The principal mechanism through which the SRF loan recipient will fulfill this requirement is by taking six steps related to providing project information to potential responsible MBE/WBEs, documenting their efforts, and providing summary reports on this activity to DHS.

Why are there MBE/WBE requirements for SRF loans? The California Safe Drinking Water State Revolving Fund Law of 1997 (Health and Safety Code Section 116760 et seq) established a loan program to provide for upgrading public water systems to ensure that all domestic water supplies meet safe drinking water standards. This law enables California to receive and make available to public water systems funds from the federal Safe Drinking Water State Revolving Fund. This fund was authorized in the federal Safe Drinking Water Act (42 U.S.C. Section 300j et seq). The State statute requires the DHS to implement this program in a manner consistent with the federal act.

Federal DWSRF regulations require compliance with MBE/WBE requirements on procurement (principally the six steps/good faith effort) and related reporting. Compliance with the MBE/WBE (a federal cross-cutter) is a component of the California SDWSRF Operating Agreement with USEPA, related Intended Use Plans, and is specified in the annual grant agreement. Compliance with federal cross-cutters is required by state SDWSRF regulations. California regulations (CCR Section 63050 (b)) provide that systems with fewer than 1000 service connections, receiving \$500,000 or less of SDWSRF funding, are generally exempt from federal cross-cutters (CCR Section 63050 (b)).

Federal law establishes cross-cutting requirements to provide small, disadvantaged, minority, and women owned businesses with the opportunity to compete to participate in contracts which are federally funded. California's drinking water SRF is funded primarily through an annual grant from the EPA. DHS manages the California drinking water SRF pursuant to a formal Operating Agreement with EPA, supplemented by an annual Intended Use Plan. Through State law, formal agreements with EPA, and federal and state guidance and regulations, DHS includes MBE/WBE provisions among the requirements with which SDWSRF loan recipients must comply.

Who is subject to MBE/WBE requirements? MBE/WBE good faith effort and reporting requirements apply to nearly all SRF funded projects. However, projects submitted by water systems which serve fewer than 1,000 service connections and are less than \$500,000, are generally exempt from MBE/WBE requirements to the extent that their project expenses can be met through State funds committed to the SRF account.

What is required of the water system? The SRF recipient loan contract will include provisions related to compliance with MBE/WBE requirements. The loan agreement will include MBE and WBE percentage participation goals. However, the good faith effort of the loan recipient, and particularly inclusion of the good faith effort requirements for prime contract bidders, is the principal mechanism of measuring compliance with the MBE/WBE program requirement. Alternatively, a water system not subject to competitive bidding requirements must include good faith effort and related goals as a requirement during contract negotiations with a prime contractor offeror. Loan recipients and prime contractors who document their meaningful actions to comply with good faith effort requirements will have met the requirement. In such cases, the loan recipient will not be penalized if actual participation of MBE and WBE is below the goals, nor will the recipient be relieved of continuing to make good faith efforts if the numerical participation goal is reached.

The SRF loan recipient complies with the MBE/WBE "good faith effort" requirement by following these six basic affirmative steps:

- (1) Place qualified small and minority businesses and women's business enterprises on solicitation lists;
- (2) Assure that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

- (3) Divide total requirements, when economically feasible, into small tasks or quantities to permit maximum participation by small and minority business and women's business enterprises;
- (4) Establish delivery schedules when the requirements of the work permit, which will encourage participation by small and minority businesses and women's business enterprises;
- (5) Use the services and assistance of the Small Business Administration (Federal construction contractor data now maintained in www.ccr.gov [the Central Contractor Registration] and the Minority Business Development Agency Department of Commerce; and
- (6) Require the prime contractor, if subcontracts are to be let, to take the affirmative steps in paragraphs (1) through (5).

Because of the nature of water system projects, implementation of good faith effort MBE/WBE requirements by the SRF loan recipient will typically involve inclusion of these requirements in the bid solicitation and in related project specifications. This approach is generally used to ensure that potential respondents to the solicitation recognize and perform the necessary steps prior to the bid submission deadline. This mechanism provides opportunities for small, minority, and women owned business enterprises to be aware of, and be able to compete as subcontractors for prime contractor bidders.

What is required of DHS field office project engineer (and when)?

Key to the Department's MBE/WBE program will be review (verification of inclusion of MBE/WBE requirements and audit of good faith efforts) of the water system and prime contractor SRF project documents and records.

1. Bid solicitation -in the plans and specifications for bid solicitation to identify a prime contractor the loan recipient should include MBE/WBE as a requirement of bid responsiveness (vs responsible bidder); this means that when DHS district staff review the plans and specifications prior to their circulation, for conformance with the proposed project, they should also confirm that the solicitation documents include provisions requiring MBE/WBE good faith effort. A log entry (date and initials) will be used to record that staff reviewed the solicitation for this requirement
2. Bid selection - the low responsible bidder selected by the SRF loan recipient shall have submitted necessary documentation of their good faith effort, and include a listing of all the subcontractors scheduled to perform work on the project. The Public Contract Code requires that prime contractors identify their subcontractors and that the prime contractor cannot replace or substitute a contractor without the permission of the public agency. Along with the bid, the prime contractor should submit to the water system documentation of their GFE outreach, which should be retained by the water system in its bid evaluation files
3. During construction inspections of the project by DHS district staff, staff may review prime contractor files related to the MBE/WBE subcontractors identified as performing tasks specific to the contract. This could be a brief check to see whether these subcontractors are performing work consistent

with the prime contractor's bid, and consistent with the quarterly reports of MBE/WBE utilization.

4. The DHS district office will receive a copy of the MBE/WBE quarterly report submitted by each project under construction
5. Quarterly reports on MBE/WBE activities are due for each project within 10 *calendar* days after each calendar quarter. DHS SRF Headquarters group will send a reminder and quarterly report form to each PWS with an SRF project under construction 10 days before the end of the quarter. Follow-up phone contact may be used with those systems not submitting the report within the required time frame. Negative reports are required (i.e. the loan recipient must submit the report even if no MBE/WBE activity took place - in which case the report would be a "negative" or "no activities to report" submission).

When is action required by the water system? A public water system should include MBE/WBE participation goals and good faith effort and reporting requirements in the bid solicitation and related specifications for projects funded by SDWSRF loans. If a bid does not conformance with good faith effort requirements, the water system will reject it during the process of selecting its the prime contractor. After the prime contract is made, brief quarterly summary forms documenting MBE/WBE services delivered during the quarter will be submitted by the prime contractor to the water system and the Department.

Conformance with MBE/WBE requirements (GFE outreach) should be a matter of bidder "responsibility". Thus a "responsible" bidder will provide the water system with documentation demonstrating its compliance with GFE outreach requirements. If GFE outreach are not shown, a bid would be eliminated from consideration as **non-responsible**, regardless of the amount of the bid.

For designated equivalency projects, the public water system should apply good faith effort outreach to all procurement supported with SDWSRF funds, even equipment and services which the system purchases for the project, aside from the prime contract. The MBE/WBE good faith effort (GFE) provisions apply to **procurement** funded by SDWSRF loan (or grant) agreements which are designated as equivalency projects. The goals and GFE apply to procurement of Construction, Equipment, Supplies, or Services (**CESS** procurement). In their letter of June 4 1999, USEPA approved the following California SDWSRF program fair share goals

	<u>MBE</u>	<u>WBE</u>
Construction	22%	9%
Equipment	14%	7%
Supplies	17%	7%
Services	16%	14%

While these goals may appear high, compliance with MBE/WBE requirements focuses on the GFE of the water system and its selected prime contractor rather than the percentage goals.

How does the water system comply? The public water system should include MBE/WBE requirements in its bid solicitation. This allows potential prime contract bidders to document their good faith effort to encourage responsible MBE/WBE firms to compete for subcontracted activities.

DHS recommends that the public water system's bid solicitations make the MBE/WBE good faith effort a requirement for the bid to be accepted as responsive. This will avoid potential situations in which the apparent low bidder among the responsible, responsive bidders is unable to document conformance with MBE/WBE requirements. Ultimately, in such a case, the apparent low bidder must be **rejected** as not responsible and cannot serve as the prime contractor because it fails to meet this requirement of the bid solicitation. Remember that many potential prime contract bidders have competed for work on wastewater projects through the Clean Water SRF, and other federal fund sources such as the USDA Rural Utility Service, which are subject to similar MBE/WBE requirements so many potential bidders are familiar with the MBE/WBE outreach and documentation process.

The water system will receive good faith effort documentation among the submissions related to bidders for the prime contract. The water system will review the good faith effort documentation for adequacy. The water system will forward a copy of the good faith effort documentation submitted by the selected responsible responsive bidder to SDWSRF headquarters MBE/WBE coordinator to be reviewed and maintained in the program's headquarters office. Upon award of the contract, the water system will include periodic reporting on utilization of MBE/WBE subcontractors in requirements of the prime contractor. The water system will monitor the conformance of those reports to the initial bid documentation, and provide quarterly reporting to the Department.

If modification or substitution of the planned utilization of MBE/WBE firms is necessary, consultation with the Department will be necessary. The water system and its prime contractor shall maintain files that can be reviewed by the Department during project inspection to verify MBE/WBE subcontractor services.

The District office can help water systems comply by identifying resources related to MBE/WBE solicitation for your area and by keeping examples of effective subcontractor solicitation.

How does DHS verify compliance by the water system and prime contractor?

During construction inspections, DHS project engineer can review files of the water system and prime contractor to verify that GFE was documented by prime contractor and verified by the loan recipient; obtain a copy of the subcontractors under the contract; and review the prime contractor's file for invoices submitted by MBE/WBE suppliers and subcontractors. The engineer may verify the date of invoice and the amount of the invoice and compare to requests for reimbursement and to MBE/WBE quarterly reports. This is a spot check audit of the water system and prime

contractor's files against the information (requests for reimbursement and MBE/WBE reports) being submitted by the water system.

What response shall DHS make if the water system or prime contractor does not comply with MBE/WBE good faith effort, reporting, or utilization requirements? The SRF loan agreement contract will include the requirements that the water system comply with MBE/WBE requirements and related participation goals. Since the MBE/WBE requirements are a contract condition of equivalency projects, failure by the water system fails to implement an effective MBE/WBE program focused on GFE may invalidate the SDWSRF funding agreement.

For further information: Questions not addressed by this introductory document, or requests for more detailed information, should be directed to:

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Background- terminology:

"Responsibility" (or "responsible" bidder) A responsible bidder means the apparent ability of the bidder to successfully carry out the requirements of a contract. The determination of bidder responsibility focuses upon the bidder's apparent ability to perform in the required manner on the date performance is required. Thus a firm that does not meet contractor classification or experience requirements established in advance by the water system for the project would be rejected as non-responsible, and not meeting the minimum criteria for consideration of the bid.

"Responsive bid or bidder": A responsive bid will address all matters required in the bid solicitation document. Bids may be rejected by the water system advertising for bids without consideration of the price bid if the bid does not conform to the bid announcement. Thus, omitting a particular element of the project, failure to refer to an addendum, or failure to provide information identified in the bid solicitation as necessary for a bid to be considered responsive may be the basis for rejection of a bid.